

FILED '06 AUG 30 17:09 USDC-ORF

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

JOHN M.. HUMMASTI,  
GRACE B. HUMMASTI,

Plaintiffs,

No. CV 06-251-MO

ORDER

v.

JOHN BUCKMASTER, MD,  
OREGON HEALTH & SCIENCE UNIVERSITY,

Defendants.

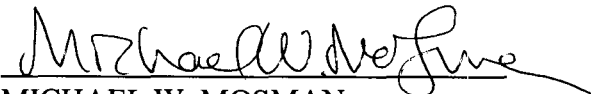
**MOSMAN, J.,**

As the parties are aware, Magistrate Judge Stewart issues Findings and Recommendation ("F&R") in this case in February 2006 recommending the plaintiffs' complaint be dismissed for lack of subject matter jurisdiction. Thereafter, plaintiffs filed an amended complaint, and the F&R was deemed moot. Presently before the court are various motions, including a motion to dismiss filed by defendants. (#15). Defendants contend the same deficiencies that existed in the first complaint, exist in the amended complaint. The court agrees. Plaintiffs allege a claim under 42 U.S.C. § 1983. However, their factual allegations are based on negligence. Negligence is not actionable under § 1983. *Buckey v. County of L.A.*, 968 F.2d 791, 794 (9th Cir. 1992); *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989). Judge Stewart noted this deficiency in relation to

the first complaint, and there are no material differences in the factual allegations in the amended complaint. To the extent plaintiffs assert claims based on other provisions of federal law, particularly Article I, Section X of the United States Constitution, I also find they have failed to state a claim. Thus, defendants' motion to dismiss (#15) is GRANTED, and the remaining pending motions are DENIED AS MOOT.

IT IS SO ORDERED.

DATED this 30 day of August, 2006.

  
MICHAEL W. MOSMAN  
United States District Court